Nationwide Precedents

2019 EOIR Immigration Judge
Training Program

June 19-20, 2019

Supreme Court

Nielsen v. Preap, 139 S. Ct. 954 (2019).

Detention After Completion of Sentence

- **Issue**: Whether mandatory detention under section 1226(c) of the Act applies only to aliens are taken into custody by immigration officials immediately following release?

- **Facts and Procedural History:** Aliens brought a habeas corpus class action against officials from DHS and DOJ, challenging their detention without bond, seeking injunctive and declaratory relief that they and proposed class members were required to be afforded bond hearings. The United States District Court for the Northern District of California, certified a class, issued preliminary injunction, and ruled that mandatory detention provision of INA applied only to aliens detained promptly after their release from criminal custody. Officials appealed.

- **Holding**: The Supreme Court held that INA's mandatory-detention requirement, without release on bond or parole, is not limited to situations in which a covered alien is taken into custody by immigration officials as soon as the alien in released from criminal custody.

Trump v. Hawaii, 138 S. Ct. 2392 (2018).

Security and Related Grounds, Power to Deny Admission or Remove in General

- **Issue:** Whether the President had authority under the Act to issue the Proclamation indefinitely barring entry by nationals from six predominantly Muslim countries and whether the entry policy violates the Establishment Clause of the First Amendment?

- **Facts and Procedural History**: The State of Hawaii sought to prohibit implementation and enforcement of the Presidential Proclamation to the extent that it indefinitely barred entry by nationals from six predominantly Muslim countries. The United States District Court for the District of Hawaii granted plaintiffs' motion for temporary restraining order (TRO) and later granted a nationwide preliminary injunction, which was stayed in part by the Court of Appeals and was stayed by the Supreme Court. Defendants appealed. The United States Court of Appeals for the Ninth Circuit affirmed in part and vacated in part. Certiorari was granted.

- **Holdings**:
(1) A presidential proclamation placing entry restrictions on nationals from eight foreign states was a valid exercise of presidential authority under 8 U.S.C.S. § 1182(f) where the President found that their entry was detrimental to the interests of the US;
(2) Even if judicial review of those findings was appropriate, the proclamation described the process, agency evaluations, and recommendation underlying the chosen restrictions and made clear that its conditional restrictions remained in force only so long as necessary to address the identified inadequacies and risks within those nations; and
(3) Although three individuals had standing to challenge the exclusion of relatives under the Establishment Clause, on rational basis review the proclamation was facially legitimate in that it, inter alia, aimed to prevent the entry of nationals who could not be adequately vetted.

Pereira v. Sessions, 138 S. Ct. 2105 (2018).

Notice to Appear, Stop-Time Rule

- **Issue**: If the government serves a noncitizen with a document that is labeled "notice to appear," but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?

- **Facts and Procedural History:** Noncitizen, a native and citizen of Brazil, filed petition for review of a BIA order upholding IJ's denial of his application for cancellation of removal and order of removal. The Court of Appeals for the First Circuit denied petition. Certiorari was granted.

- **Holding**: The Supreme Court held that a putative notice to appear that fails to designate the specific time or place of a noncitizen's removal proceedings is not a notice to appear and so does not trigger the Act's stop-time rule ending the noncitizen's period of continuous presence in the United States. Reversed and remanded.

BIA & AG CASES

ADJUSTMENT OF STATUS

***1. MATTER OF A.J. VALDEZ*, 27 I. & N. Dec. 496 (BIA 2018)– Willful Misrepresentation**

An applicant makes a willful misrepresentation under INA section 212(a)(6)(C)(i), when he/she knows of or authorizes false statements in an application filed on the applicant's behalf. An alien's signature on an immigration application establishes a strong presumption that he/she knows of and has assented to the contents of the application, but the alien can rebut the presumption by establishing fraud, deceit, or other wrongful acts by another person.

Because the respondents signed the applications for adjustment of status, there is a strong presumption they knew the contents of the applications. Claiming they did not speak or read English and as a result, they did not know the contents of the applications, is insufficient to rebut that presumption. The Board of Immigration Appeals (BIA) found that the respondents were incredible and that the nature and significance of the documents made it reasonable that they would take steps to ascertain the accuracy of the documents they sign and obtain translation if necessary. The conscious choice to avoid knowing about the misrepresentations does not excuse the false statements.

ADJUSTMENT OF STATUS

***2. MATTER OF SOTHON SONG*, 27 I. & N. Dec. 488 (BIA 2018)—K-1 Visa**

The plain language of 8 C.F.R. § 213a.2 (b)(2018) requires that the petitioner provides an affidavit of support for the applicant for adjustment of status, who was admitted under a **K-1 visa**, has fulfilled the terms of the visa by marrying the petition, and was later divorced. The affidavit of support must be valid at the time of filing and at the time of adjudication of the application. If it is invalid, the applicant is inadmissible as public charge. Because the respondent's former husband withdrew his affidavit of support before the adjudication of adjustment of status, the respondent is inadmissible as a public charge.

ASYLUM, WITHOLDING OF REMOVAL, CAT

***1. Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018)—Asylum; Material Support Bar**

Under the material support bar, a respondent who has engaged in an act that she knows, or reasonably should know, affords material support to a terrorist organization is ineligible for asylum. The word "material" in the phrase "material support" relates to the type of aid the respondent provided to the organization, and is not a quantitative requirement. A respondent provides "material support" to a terrorist organization if she engaged in an act, "regardless of whether it was intended to aid the organization, if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimus degree." *Matter of A-C-M-*, 27 I&N Dec. at 308. In the case at hand, the BIA found that the respondent provided material support where she cooked and cleaned for a terrorist organization, because if she had not done so, another person would have done it.

ASYLUM, WITHOLDING OF REMOVAL, CAT

***2. Matter of A-B-*, 27 I&N Dec. 316 (AG 2018), *abrogated by Grace v. Whitaker*, 344 F. Supp. 3d. 96 (D. D.C. Dec. 19, 2018)—Asylum; Particular Social Group**

The Attorney General emphasized that claims related to domestic violence or generalized gang violence perpetrated by non-governmental actors generally do not give rise to asylum eligibility. In particular, such claims generally lack the requisite evidence that the persecution was inflicted by a group or individual the government is unable or unwilling to address. The mere fact that certain countries do not effectively police certain crimes, or that certain populations are more likely to be victims of crimes, is insufficient to satisfy the statutory grounds for asylum.

ASYLUM, WITHOLDING OF REMOVAL, CAT

***3. Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018), *stayed*, 27 I&N Dec. 481 (AG 2018)—Asylum, Bars to Relief, Duress Exception to Persecutor Bar**

The persecutor bar to asylum and withholding of removal contemplates a duress exception.

The Department must first show that the respondent assisted or otherwise participated in persecution. In determining whether the Department has met its burden, the IJ should consider the nexus between (1) the respondent's role, acts, or inaction and the persecution, and (2) his prior or contemporaneous knowledge of the persecution.

The burden then shifts to the respondent to demonstrate that he did not engage in persecution or that he acted under duress. The demonstrate duress, the respondent must show that "he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others." *Matter of Negusie*, 27 I&N Dec. at 363.

ASYLUM, WITHOLDING OF REMOVAL, CAT

***4. MATTER OF J-R-G-P-*, 27 I. & N. Dec. 482 (BIA 2018)– CAT**

The respondent had not experienced past torture but he claimed that because of his **mental health issues**, he will be arrested and either imprisoned or committed to a mental health facility, where law enforcement officials or mental health workers will subject him to harm rising to the level of torture.

The BIA held that, "Where the evidence regarding an application for protection under the [CAT] plausibly establishes that abusive or squalid conditions in pretrial detention facilities, prisons, or mental health institutions in the country of removal are the result of neglect, a lack of resources, or insufficient training and education, rather than a *specific intent* to cause severe pain and suffering, an IJ's finding that the applicant did not establish a sufficient likelihood that he or she will experience "torture" in these settings is not clearly erroneous." *Id.* at 485–86. Because the respondent has not experienced past harm or shown the government's specific intent to torture him, he cannot establish that it will be more likely than not he would experience torture upon return to Mexico.

BOND

***MATTER OF M-S-*, 27 I. & N. Dec. 509 (AG 2019)– Expedited Removal**

The AG overruled *Matter of X-K-*, 23 I&N Dec. 731 (holding that only arriving aliens attempting to come into the United States at a port-of-entry are subject to mandatory detention after establishing a credible fear and being transferred from expedited removal proceedings to full removal proceedings).

The AG also stated that pursuant to INA § 235(b)(1)(B)(ii), an alien, who was transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture, is ineligible for release on bond. Such an alien must be detained until his removal proceedings conclude, unless he is granted parole. Because the respondent was placed in expedited removal proceedings, he is ineligible for release on bond after establishing a credible fear of persecution and while his asylum claim is being adjudicated.

CANCELLATION OF REMOVAL

***1. Matter of Medina-Jimenez*, 27 I&N Dec. 399 (BIA 2018)—Statutory Eligibility**

The categorical approach does not apply when deciding whether a respondent's violation of a protection order resulted in a conviction for an offense under INA section 237(a)(2)(E)(ii) for purposes of cancellation of removal. Instead, the IJ should consider evidence regarding what the state court determined about his violation, which requires two distinct inquiries.

First, the IJ must determine whether the offense resulted in a conviction as defined in INA section 101(a)(48)(A). Second, the IJ must decide whether the state court found that the respondent engaged in conduct that violated a protection order that involved protection against credible threats of violence, repeated harassment, or bodily injury to the persons for whom the protective order was issued, and whether the order was issued for the purpose of preventing violent or threatening acts of domestic violence, as is discussed in *Matter of Obshatko*, 27 I&N Dec. 173, 175 (BIA 2017).

CANCELLATION OF REMOVAL

***2. Matter of Mendoza-Hernandez*, 27 I&N Dec. 520 (BIA 2019)—Notice to Appear**

Where a notice to appear "does not specify the time and place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information 'perfects' the deficient notice to appear [and] satisfies the notice requirements of section 239(a)(1) of the Act, and triggers the 'stop-time' rule of section 240A(d)(1)(A) of the Act." *Matter of Mendoza-Hernandez*, 27 I&N Dec. at 535. Accordingly, if a respondent is served a deficient notice to appear, his period of continuous physical presence is stopped pursuant to the stop-time rule when he is served a hearing notice that includes the time and date of his initial removal hearing.

CRIMES

AGGRAVATED FELONY

***1. Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018)—Offense Relating to Obstruction of Justice**

The INA does not define the aggravated felony "offense relating to obstruction of justice" described in INA section 101(a)(43)(S). Accordingly, the BIA adopted a generic definition of the phrase based on a review of chapter 73 of the Federal criminal code, the United States Sentencing Guidelines Manual in effect at the time Congress enacted INA section 101(a)(43)(S), and the Model Penal Code.

The BIA concluded that an offense relating to obstruction of justice "involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere in either an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding." *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 460.

CRIMES

AGGRAVATED FELONY

***2. MATTER OF A. VASQUEZ*, 27 I. & N. Dec. 503 (BIA 2019)**

INA section 101(a)(43)(H) expressly defined aggravated felony so that it includes only crimes relating to the demand for or receipt of ransom as aggravated felony. However, because the plain language of INA section 101(a)(43)(H) does not expressly include 18 U.S.C. § 1201, the crime of kidnapping, it is not an aggravated felony for immigration purposes.

CRIMES

CRIME INVOLVING MORAL TURPITUDE (CIMT)

1. Matter of Ortega-Lopez, 27 I&N Dec. 382 (BIA 2018)—Animal Fighting

Animal fighting, in violation of 7 U.S.C. § 2156(a)(1), is a CIMT. The conduct encompassed in 7 U.S.C. § 2156(a)(1) celebrates animal suffering, transgresses socially accepted rules of morality, and breaches the duty owed to society in general. The BIA noted that in assessing whether an offense is a CIMT, the absence of an intent to injure, an injury to persons, or a protected class of victims is not determinative; rather, the determination of whether an offense qualifies as a CIMT requires a case-by-case analysis. In other words, the definition of a CIMT applied in the Ninth Circuit, which states that CIMTs include offenses involving an intent to injure, an injury to persons, or a protected class of victims, should not be read to exclude other offenses that may be CIMTs but that do not fall into one of those categories.

In addition, the BIA concluded that the respondent's conviction for animal fighting was an "offense under" INA section 237(a)(2) that rendered him ineligible for cancellation of removal under INA section 240A(b) irrespective of the general "admission" requirement of INA section 237(a) and the temporal requirement of section 237(a)(2)(A)(i)(I). Specifically, the BIA observed that INA section 240A(b)'s "offense under" language incorporates only the offense-specific characteristics of the cross-referenced sections, not the admission requirement.

CRIMES

CRIME INVOLVING MORAL TURPITUDE (CIMT)

2. Matter of J.M. Acosta, 27 I&N Dec. 420 (BIA 2018)—Possession of a Controlled Substance with Intent to Distribute

Possession of a controlled substance with intent to distribute , in violation of New York Penal Law section 220.39, is a CIMT because (1) it requires a mental state of knowledge or intent, and (2) the unlawful distribution of drugs is inherently reprehensible conduct. This is so even though the respondent asserted he could have intended to sell drugs to relieve another person's medical condition. The law specifically prohibits intentional unauthorized sale of drugs to prevent harm to the general population.

In addition, the BIA found that "conviction," as defined in INA section 101(a)(48)(A), is ambiguous and proceeded to interpret the definition. Under its interpretation, a conviction is not sufficiently final for immigration purposes until the right to direct appellate review on the merits of the conviction is exhausted or waived.

This requires the Department to provide proof of a waiver of appeal rights or expiration of the time to file an initial direct appeal. If the Department establishes that a respondent has a criminal conviction at the trial level and the time for filing a direct appeal has passed, a presumption arises that his conviction is final for immigration purposes. To rebut the presumption, the respondent must provide evidence that an appeal has been filed within the deadline and that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings. Appeals that do not relate to the underlying merits of the conviction do not eliminate the finality of the conviction.

CRIMES

CRIME INVOLVING MORAL TURPITUDE (CIMT)

***Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018)—Possession of Forged Instrument**

The respondent was convicted for possession of a forged instrument, in violation of California Penal Code section 475(a). At the time he was sentenced, the maximum sentence for his offense was 365 days. The IJ found he had been convicted of a CIMT for which a sentence of one year or longer could be imposed. After he was sentenced, the California legislature enacted section 18.5, which reduced the maximum sentence for the conviction to 364 days, then subsequently amended section 18.5 to apply retroactively.

Nevertheless, the BIA found that he was convicted for an offense for which he could have been sentenced to one year or more. Federal law, not state law, determines the immigration consequences of a state conviction. Relevant in the respondent's case, INA section 237(a)(2)(A)(i)(II) calls for a "backward-looking inquiry" into the maximum possible sentence he could have received at the time of his conviction. Because the respondent could have been sentenced to 365 days at the time of his conviction, he was convicted of a crime as defined in INA section 237(a)(2)(A)(i)(II), and section 18.5 did not affect the applicability of that section to his offense.

MISCELLANEOUS

CASES REFERRED TO THE ATTORNEY GENERAL

1. ***Matter of M-G-G-*, 27 I&N Dec. 469 (AG 2018)**
2. ***Matter of Castillo-Perez*, 27 I&N Dec. 495 (AG 2018)**
3. ***Matter of L-E-A-*, 27 I&N Dec. 494 (AG 2018)**
4. ***Matter of Negusie*, 27 I&N Dec. 481 (AG 2018)**
5. ***Matter of M-G-G-*, 27 I&N Dec. 475 (AG 2018)—Remand to BIA**
6. ***Matter of M-G-G-*, 27 I&N Dec. 469 (AG 2018)—Referral to AG**
7. ***Mater of M-S-*, 27 I&N Dec. 476 (AG 2018)**

MISCELLANEOUS

JURISDICTION

1. *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018)—IJ Jurisdiction; Notice to Appear

The BIA held that a notice to appear need not specify the time and date of an initial removal hearing to satisfy the statutory notice requirement, as long as this information is provided in a subsequent hearing notice. The regulations provide that jurisdiction vests when a *charging document* is filed with the immigration court, and do not mandate that the document specify the time and date of the initial hearing for jurisdiction to vest. 8 C.F.R. § 1003.15(b).

MISCELLANEOUS

JURISDICTION

2. *MATTER OF M-A-C-O-*, 27 I. & N. Dec. 477 (BIA 2018)

The IJ has jurisdiction over a former Unaccompanied Alien Child (UAC) who turned eighteen before filing the application. Because the respondent's asylum application was filed after he turned eighteen, the IJ has jurisdiction over the application.

MISCELLANEOUS

MOTIONS

***1. Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018)—Motion to Continue**

IJs have authority to grant motions for continuances "for good cause shown." 8 C.F.R. § 1003.29. When a respondent seeks a continuance to accommodate collateral proceedings, the primary consideration in the good-cause inquiry is the likelihood that his collateral pursuit will be successful and materially affect the outcome of removal proceedings. Other factors relevant to the good-cause assessment include the respondent's diligence in seeking collateral relief; the Department's response; and concerns of administrative efficiency. The IJ may also consider the length of the continuance requested, the number of hearings held and continuances granted previously, and the timing of the motion for a continuance. The IJ should state his reasons for granting a continuance on the record or in a written decision.

MISCELLANEOUS

MOTIONS

***2. Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (AG 2018)—Motion to Terminate**

IJs may only terminate proceedings when the Department cannot sustain the charge of removability, or in other specific circumstances consistent with the law and regulations. *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. at 465, 466 n.1 (citing 8 C.F.R. §§ 1216.4(a)(6), 1235.3(b)(5)(iv), 1238.1(e), 1239.2, 1245.13(l)). For example, an IJ may dismiss the proceedings on the Department's motion where the notice to appear was improvidently issued or circumstances of the case changed after the notice to appear was issued to such an extent that continuation of removal proceedings is no longer in the best interest of the government. IJs may also terminate removal proceedings "to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." 8 C.F.R. § 1239.2(f). In situations where termination is not contemplated by the regulations, removal proceedings must continue.

United States Department of Justice • Executive Office for Immigration Review
Office of the Chief Immigration Judge

District Court Litigation with National Impact

2019 EOIR Immigration Judge Training Program

June 19-20, 2019

Padilla v. ICE, 354 F.Supp.3d 1218 (W.D. Wash. Dec. 11, 2018) (Nationwide)

- Class:
  - "All detained asylum seekers who entered the US without inspection, were initially subject to expedited removal under INA § 235(b), were determined to have a credible fear of persecution, but are not provided a bond hearing with a verbatim transcript or recording of the hearing within 7 days of requesting a bond hearing."
- Effect:
  - Bond hearing must be conducted within 7 days of member's request (and release any member whose detention exceeds that time);
  - DHS bears burden of proof;
  - Hearing must be recorded; and
  - IJ must provide a written decision "with particularized determinations of individualized findings at the conclusion of the bond hearing"
- Preliminary injunction stayed until July 1, 2019.
- Note: *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (effective July 15, 2019)
  - An alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond.

Aleman-Gonzalez v. Sessions, No. 18-cv-01869-JSC, 2018 WL 2688569 (N.D. Cal. June 5, 2018) (Ninth Circuit Only)

- Class:
  - All individuals detained pursuant to INA § 241(a)(6) in the Ninth Circuit, including individuals:
    - with an administratively final order issued pursuant to INA § 238(b);
    - in withholding-only proceedings under 8 C.F.R. § 1208.31(e); and,
    - awaiting judicial review of the Board of Immigration Appeal's denial of a motion to reopen removal proceedings
- Effect:
  - A bond hearing for an *Aleman-Gonzalez* class member must be held on or before the member's 180th day in detention (ICE sends weekly email notifications for persons at 166 days);
  - DHS bears burden of proof;
  - Hearing must be recorded

Martinez Baños v. Asher, No. C16-1454-JLR, 2018 WL 1617706 (W.D. Wash. Apr. 4. 2018) (Ninth Circuit Only)

- Class:
  - Aliens in withholding-only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington after having a removal order reinstated
- Effect:
  - Class members are eligible for bond hearing after six months of detention and every six months thereafter
  - DHS bears the burden of proof
  - Narrower class than *Aleman Gonzalez*

Abdi v. Nielsen, 287 F.Supp.3d 327(W.D.N.Y. Feb. 9, 2018) (New York Only)

- Class:
  - "all arriving asylum-seekers who have passed a credible fear interview and who are or will be detained at the Buffalo Federal Detention Facility and who have not been granted parole";
  - Sub-class:
    - "all arriving asylum-seekers who are or will be detained at the Buffalo Federal Detention Facility, have passed a credible fear interview, and have been detained for more than six months without a bond hearing before an immigration judge."
- Effect:
  - Class members are eligible for bond hearing after six months of detention
  - Consider ability to pay and alternative conditions of release
- Note: the Government has filed a motion to vacate in light of the Supreme Court's decision in *Jennings. Abdi v. McAleenan*, No. 1:17-CV-00721 EAW, 2019 WL 1915306 (W.D.N.Y. Apr. 30, 2019)

Rivera v. Holder, 307 F.R.D. 539 (W.D. Wash. 2015) (Seattle/Tacoma Only)

- Class:
  - "All individuals who are or will be subject to detention under 8 U.S.C. § 1226(a), and who are eligible for bond, whose custody proceedings are subject to the jurisdiction of the Seattle and Tacoma Immigration Courts; excluding those who (a) are being detained without bond following a bond determination and (b) those who have been released from custody."
- Effect:
  - IJ should consider conditional parole in every bond hearing
  - Although the order is limited on its face to Seattle/Tacoma, nationwide compliance may minimize similar lawsuits in other jurisdictions.

Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017) (Central Dist. California)

- Class:
  - Non-citizens in removal proceedings who are detained under INA § 236(a) who are neither dangerous nor a flight risk
- Immigration Judge must consider the alien's ability to pay when determining bond amounts.
- Although the order is limited on its face to the Central District of California, nationwide compliance may minimize similar lawsuits in other jurisdictions.

ABT v. USCIS, No. C11-2108 RAJ, 2013 WL 5913323(W.D. Wash. Nov. 4, 2013) (Nationwide)

- Class:
  - All noncitizens in the United States who have:
    - been placed in removal proceedings,
    - filed a complete Form I-589, and
    - filed or will file a Form I-765, Application for Employment Authorization, pursuant to 8 C.F.R. §274a.12(c)(8)
- Effect:
  - Employment Authorization Asylum Clock Notices;
  - "Lodged not filed" I-589 applications
- Parties entered into a nationwide settlement agreement on 9/18/13, ending on 9/18/19

Rojas v. Johnson, 305 F. Supp. 3d 1176 (W.D. Wash. 2018) (Nationwide)

- Class:
  - "Credible Fear" Class:
    - All individuals who have been or will be released from DHS custody after positive credible fear and did not receive notice from DHS of the one-year filing deadline for asylum
  - "Other Entrants" Class:
    - All individuals who have been or will be detained upon entry; express a fear of return; are released or will be released from DHS custody without a credible fear determination; are issued a NTA; and did not receive notice from DHS of the one-year filing deadline for asylum
- Effect:
  - Give parties' written notice (see next slide); and
  - Under the interim stay agreement, Defendants agreed to find all class members' asylum applications timely filed in pending adjudications before IJs, the BIA, and USCIS asylum officers during the stay.

NOTICE FOR ASYLUM SEEKERS
ABOUT THE FILING DEADLINE FOR ASYLUM APPLICATIONS[1]

If you are an asylum seeker who has filed, or will be filing, an asylum application more than one year after you arrived in the United States, you may benefit from a recent court decision. Under U.S. law, an asylum seeker generally must file an asylum application within one year of arriving in the United States or the application may be denied. Following a recent court decision in *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. Mar. 29, 2018), the parties have entered into a joint stay agreement. Under this agreement, the government has agreed, on an interim basis, to treat pending or newly filed asylum applications by certain asylum applicants as though they were filed within the one-year deadline, if the application is adjudicated while the agreement is in effect. This means that while the agreement is in effect, Asylum Officers, Immigration Judges, and the Board of Immigration Appeals will not refer or deny certain asylum applications because the applicant did not file the application within one year of arriving in the United States. The agreement does not apply to asylum seekers whose asylum application has already received a final denial decision. This agreement will last until further notice.[2]

TO BENEFIT FROM THIS AGREEMENT, YOU MUST:

1. **Depending on where your application is pending, notify the USCIS asylum office, EOIR immigration judge, or the Board of Immigration Appeals (if your case is before the Board on appeal) that you are a *Mendez Rojas* class member.** For example, you can do this by filing a motion or notice of class membership. Information and samples provided by class counsel are available at: https://www.americanimmigrationcouncil.org/sites/default/files/mendez_rojas_v_johnson_faq.pdf.
2. **Be a member of one of the following classes of individuals:**

Class A.I	Class B.I
Individuals who 1) have been or will be released from DHS custody after having been found to have a credible fear of persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v); 2) did not receive notice from DHS of the one-year filing deadline for asylum applications; 3) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 4) are not in removal proceedings.	Individuals who 1) have been or will be detained by DHS upon their arrival into the country; 2) express a fear of return to their home country to a DHS official; 3) have been or will be released from DHS custody without a credible fear determination; 4) are issued a Notice to Appear; 5) did not receive notice from DHS of the one-year filing deadline for asylum applications; 6) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 7) are not in removal proceedings.
Class A.II	**Class B.II**
Individuals who 1) have been or will be released from DHS custody after having been found to have a credible fear of persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v); 2) did not receive notice from DHS of the one-year filing deadline for asylum applications; 3) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 4) are in removal proceedings.	Individuals who 1) have been or will be detained by DHS upon their arrival into the country; 2) express a fear of return to their home country to a DHS official; 3) have been or will be released from DHS custody without a credible fear determination; 4) are issued a Notice to Appear; 5) did not receive notice from DHS of the one-year filing deadline for asylum applications; 6) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 7) are in removal proceedings.

[1] The information contained in this notice is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.
[2] Further questions regarding this notice can be addressed to class counsel from the Northwest Immigrant Rights Project at mendezrojas@nwirp.org.

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NWIRP v. Sessions, No. C17-716 RAJ, 2017 WL 6492703 (W.D. Wash. Dec. 19, 2017) (Nationwide)

- Not a class action; scope of representation.
- Regarding the scope of "practice" and "preparation" as defined by 8 C.F.R §§ 1001.1 (i) and (k), and EOIR's ability to impose disciplinary sanctions on practitioners pursuant to 8 C.F.R § 1003.102(t) for failure to submit a Notice of Entry of Appearance form when engaging in "practice" and "preparation"
- Nationwide preliminary injunction prohibiting enforcement of 8 CFR § 1003.102(t) against NWIRP, attorneys under NWIRP's supervision or control, or who are otherwise associated with them, and those who self-identify and disclose their assistance on *pro se* filings
- Regulations to-be made

Saravia v. Sessions, No. 17-cv-03615-VC (N.D. Cal. Nov. 20, 2017) (Nationwide)

- Class:
  - Noncitizens who came to the country as an unaccompanied minor,
  - Who were previously detained in ORR custody and then released by ORR to a sponsor, and
  - Who have been or will be rearrested by DHS on the basis of a removability warrant on or after April 1, 2017, on allegations of gang affiliation.
- Effect:
  - Under the preliminary injunction, class members are entitled to a bond hearing before an immigration judge, within seven days of arrest, to challenge the basis of allegations of gang affiliation.
  - The minor's sponsor must receive notice and be given an opportunity to participate in the hearing.
  - At the hearing, DHS must present evidence that the minor is a danger to the community, notwithstanding ORR's prior determination that the minor was not a danger.
  - If the IJ decides that the government has not made an adequate showing of changed circumstances such that the minor is a danger to the community, or decides that the minor has successfully rebutted the showing of changed circumstances, the minor must be released into the custody of the previous sponsor
  - DHS and HHS are determining how many minors are in its custody are entitled to a Saravia hearing.

Flores v. Sessions, 862 F.3d 863 (9th Cir. 2017) (Nationwide)

- Class:
  - "[a]ll minors who are detained in the legal custody of the INS"
- Bond hearings available, nationwide, to:
  - (1) children in the custody of ORR at a staff-secure or secure facility and
  - (2) pursuant to discussions with counsel, any other child in ORR custody who affirmatively requests a bond hearing with ORR or before the immigration court

Franco-Gonzales v. Holder, CV 10-02211 DMG (DTBx) (April 23, 2013) (Washington, California, Arizona)

- Class:
  - *pro se*, detained aliens with mental competency issues
- Effect:
  - Class members are entitled to a bond hearing after being detained by DHS for 180 days
  - DHS bears the burden of demonstrating by clear and convincing evidence that ongoing detention is justified

Hamama v. Adducci, 912 F.3d 869 (6th Cir. 2018) (Nationwide)

- Prior Class *see Hamama v. Adducci*, 17-cv-11910 (E.D. Mich. June 15, 2017):
- All Iraqi nationals in the United States who had final removal orders as of 6/24/17, and who have been or will be detained by ICE.
- Petitioners sought to allow class members an opportunity to reopen prior removal orders in light of changed country conditions in Iraq.
- Update:
  - The Sixth Circuit Court of Appeals vacated both preliminary injunctions, finding that INA § 242(f) barred class-wide injunctive relief and that the class was not entitled to a bond hearing in light of *Jennings*.

Rodriguez v. Marin, 909 F.3d 252 (9th Cir. 2018) (C.D. Cal)

- In *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), the Supreme Court held that INA §§ 235(b), 236(a), 236(c) do not give detained aliens the right to periodic bond hearings during the course of their detention.
- Currently on remand in the District Court. No impact outside the Central District of California.

Grace v. Whitaker, No. 18-CV-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018) (Nationwide)

- Plaintiffs are 11 individuals apprehended near the border and found to lack a credible fear.
- They challenge the Attorney General's decision in *Matter of A-B-*, as well as USCIS guidance implementing that decision, as unlawful under the INA, the APA, and the Constitution.
- Effect:
  - Where an Asylum Officer relies on *Matter of A-B-*, the IJ shall vacate the negative credible fear determination
  - *See* Guidance on Grace v. Whitaker from General Counsel (Dec. 19, 2018)

Innovation Law Lab v. McAleenan, No. 19-15716, 2019 WL 2005745 (9th Cir. May 7, 2019)

- EOIR is not a party to these proceedings
- The Ninth Circuit granted DHS's motion for a stay of the preliminary injunction pending its appeal regarding the "Migrant Protection Protocols" announced in the January 25, 2018, DHS policy memorandum and explicated in further agency memoranda.

SCOTUS Case Summary

2019 EOIR Immigration Judge
Training Program
June 19-20, 2019

A Summary of Immigration-Related Supreme Court Cases Issued Since Last IJ Conference.

1. Nielsen v. Preap, 139 S. Ct. 954 (2019).
Detention After Completion of Sentence

Issue:
Whether mandatory detention under section 1226(c) of the Act applies only to aliens are taken into custody by immigration officials immediately following release?

Facts and Procedural History:
Aliens brought a habeas corpus class action against officials from DHS and DOJ, challenging their detention without bond, seeking injunctive and declaratory relief that they and proposed class members were required to be afforded bond hearings. The United States District Court for the Northern District of California, certified a class, issued preliminary injunction, and ruled that mandatory detention provision of INA applied only to aliens detained promptly after their release from criminal custody. Officials appealed.

Holding:
The Supreme Court held that INA's mandatory-detention requirement, without release on bond or parole, is not limited to situations in which a covered alien is taken into custody by immigration officials as soon as the alien in released from criminal custody.

2. Trump v. Hawaii, 138 S. Ct. 2392 (2018).
Security and Related Grounds, Power to Deny Admission or Remove in General

Issue:
Whether the President had authority under the Act to issue the Proclamation indefinitely barring entry by nationals from six predominantly Muslim countries and whether the entry policy violates the Establishment Clause of the First Amendment?

Facts and Procedural History:
The State of Hawaii sought to prohibit implementation and enforcement of the Presidential Proclamation to the extent that it indefinitely barred entry by nationals from six predominantly Muslim countries. The United States District Court for the District of Hawaii granted plaintiffs' motion for temporary restraining order (TRO) and later granted a nationwide preliminary injunction, which was stayed in part by the Court of Appeals and was stayed by the Supreme Court. Defendants appealed. The United States Court of Appeals for the Ninth Circuit affirmed in part and vacated in part. Certiorari was granted.

Holdings:
The Supreme Court, Chief Justice Roberts, held that:

(1) A presidential proclamation placing entry restrictions on nationals from eight foreign states was a valid exercise of presidential authority under 8 U.S.C.S. § 1182(f) where the President found that their entry was detrimental to the interests of the US;
(2) Even if judicial review of those findings was appropriate, the proclamation described the process, agency evaluations, and recommendation underlying the chosen restrictions and made clear that its conditional restrictions remained in force only so long as necessary to address the identified inadequacies and risks within those nations; and
(3) Although three individuals had standing to challenge the exclusion of relatives under the Establishment Clause, on rational basis review the proclamation was facially legitimate in that it, inter alia, aimed to prevent the entry of nationals who could not be adequately vetted.*v. United States,* 323 U.S. 214,.

Reversed and remanded.

3. Pereira v. Sessions, 138 S. Ct. 2105 (2018).
Notice to Appear, Stop-Time Rule

Issue:
If the government serves a noncitizen with a document that is labeled "notice to appear," but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?

Facts and Procedural History:
Noncitizen, a native and citizen of Brazil, filed petition for review of a BIA order upholding IJ's denial of his application for cancellation of removal and order of removal. The Court of Appeals for the First Circuit denied petition. Certiorari was granted.

Holding:
The Supreme Court held that a putative notice to appear that fails to designate the specific time or place of a noncitizen's removal proceedings is not a notice to appear and so does not trigger the Act's stop-time rule ending the noncitizen's period of continuous presence in the United States. Reversed and remanded.